Supreme Court, U.S.
FILED

97-19 JUL 1 1997

No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

DAVID L. SMITH,

Petitioner,

v.

SUPREME COURT OF THE STATE OF COLORADO, UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Colorado and the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether by failing or refusing to consider the issues raised and argued by Mr. Smith in his petition for rehearing of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, in his motion to vacate this order, and in his petition for rehearing of the denial of his motion to vacate this order, the Tenth Circuit and its disciplinary panel have deprived him of his Fifth Amendment due process right to an effective opportunity for review of this harsh and unjustified suspension order.

Whether by failing or refusing to consider the issues raised and argued by Mr. Smith in his petition for rehearing of the Colorado Supreme Court's (March 3, 1997) opinion, in his petition for a writ of habeas corpus with respect to this opinion, and in his petition for rehearing of the denial of his petition for a writ of habeas corpus, the Colorado Supreme Court has deprived him of his Fourteenth Amendment due process right to an effective opportunity for review of this opinion, which merely rubber-stamps the Tenth Circuit disciplinary panel's harsh and unjustified suspension order.

Whether by failing or refusing to grant a hearing or to consider the issues raised and argued by Mr. Smith in his petition for a writ of habeas corpus, and

in his petition for rehearing of the denial of his petition for a writ of habeas corpus, the Colorado Supreme Court has abdicated its power and responsibility to issue writs of habeas corpus pursuant to Article VI, Section 3 of the Constitution of the State of Colorado, and has suspended the privilege of the writ of habeas corpus, in violation of Article II, Section 21 of the Constitution of the State of Colorado, and Article I, Section 9 of the Constitution of the United States.

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Smith v. Supreme Court of the State of Colorado, Order (Colo. Sup. Ct. May 5, 1997).

JURISDICTION

The opinions and orders sought to be reviewed were entered on November 29, 1993, March 3, 1997, and April 30, 1997. Rehearing of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order was denied by order dated January 3, 1994. Mr. Smith's motion to vacate the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order was denied by order dated July 18, 1995. Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 1, 1995) of the Tenth Circuit disciplinary panel's (July 18, 1995) order is still pending before the Tenth Circuit and its disciplinary panel. Rehearing of the Colorado Supreme Court's (March 3, 1997) opinion was denied by order dated April 7, 1997. Mr. Smith's petition for a writ of habeas Corpus with respect to the Colorado Supreme Court's (March 3, 1997) opinion was denied by order dated April 30, 1997. Rehearing of the Colorado Supreme Court's (April 30, 1997) order was denied by order dated May 5, 1997.

The statutory provisions believed to confer jurisdiction on the Supreme Court of the United States to review on writ of certiorari the opinions and orders in question are 28 U.S.C. §§ 1254 and 1257.

CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

Article I, Section 9 of the Constitution of the United States provides in relevant part as follows:

> The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

Amendment V of the Constitution of the United States provides in relevant part as follows:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Amendment XIV, Section 1 of the Constitution of the United States provides in relevant part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article II, Section 21 of the Constitution of the State of Colorado provides in relevant part as follows:

> The privilege of the writ of habeas corpus shall never be suspended, unless when in case of rebellion or invasion, the public safety may require it.

Article VI, Section 3 of the Constitution of the State of Colorado provides in relevant part as follows:

> The supreme court shall have power to issue writs of habeas corpus . . . with authority to hear and determine the same; and each judge of the supreme court shall have like power and authority to issue writs of habeas corpus.

Pro se attorney-petitioner David L. Smith ("Mr. Smith") hereby files his petition for writ of certiorari to the Supreme Court of the State of Colorado and the United States Court of Appeals for the Tenth Circuit:

I. STATEMENT OF THE CASE

On November 29, 1993, the three-judge disciplinary panel of the United States Court of Appeals for the Tenth Circuit (composed of Seymour, Chief Judge and Baldock and Brorby, Circuit Judges) issued its order indefinitely suspending Mr. Smith from the practice of law in the Tenth Circuit for filing alleged "frivolous" appeals of U.S. District Court sanction orders to the Tenth Circuit in four federal civil rights cases, and for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the United States District Court for the District of Colorado. See In re Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994). Mr. Smith may apply for reinstatement to the Tenth Circuit bar when he can demonstrate that each sanction order of the Tenth Circuit and the U.S. District Court has been "satisfied."

On January 3, 1994, the Tenth Circuit disciplinary panel issued its order denying Mr. Smith's petition for

rehearing and suggestion for rehearing en banc of its (November 29, 1993) suspension order without considering the issues raised and argued by him therein.

On July 18, 1995, the Tenth Circuit disciplinary panel denied Mr. Smith's motion to vacate its (November 29, 1993) suspension order without considering the issues raised and argued by him therein. Mr. Smith's petition for rehearing and suggestion for rehearing en banc (filed on August 1, 1995) of the Tenth Circuit disciplinary panel's (July 18, 1995) order is still pending before the Tenth Circuit and its disciplinary panel.

On March 3, 1997, the Supreme Court of the State of Colorado issued its opinion reciprocally disciplining Mr. Smith based on the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order. See People v. Smith, ____ P.2d ____ (Colo. 1997). In its (March 3, 1997) opinion, the Colorado Supreme Court accepted the recommendations of the hearing board and hearing panel of the grievance committee of the Colorado Supreme Court that Mr. Smith be suspended from the practice of law in the State of Colorado for nine months, effective 30 days after the opinion is issued; that prior to reinstatement he demonstrate that all sanctions imposed by the Tenth Circuit

and the U.S. District Court have been satisfied and that all federal suspensions have been lifted; and in the event that he meets these conditions prior to the expiration of the nine-month suspension, that he may petition the Colorado Supreme Court for immediate reinstatement. The Colorado Supreme Court also ordered Mr. Smith to pay the costs of the reciprocal discipline proceedings in the amount of $1,863.43 within ninety days from the date of its opinion.

On April 7, 1997, the Colorado Supreme Court issued its order denying Mr. Smith's petition for rehearing of its (March 3, 1997) opinion without considering the issues raised and argued by him therein.

On April 30, 1997, the Colorado Supreme Court issued its order denying Mr. Smith's petition for a writ of habeas corpus with respect to its (March 3, 1997) opinion without granting a hearing or considering the issues raised and argued by him therein.

On May 5, 1997, the Colorado Supreme Court issued its order denying Mr. Smith's petition for rehearing of its (April 30, 1997) order without considering the issues raised and argued by him therein.

II. ARGUMENT

In its (March 3, 1997) opinion, the Colorado Supreme Court declined to consider the merits of Mr. Smith's defenses to the allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint that he had been indefinitely suspended from the practice of law in the Tenth Circuit for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00. The Colorado Supreme Court said:

> In the first place, we do not read the court of appeals order as disciplining the respondent for failure to pay the sanctions imposed against him. The respondent was suspended for filing frivolous appeals, as set forth in the show cause order. After admitting at oral argument that he had not paid any of the sanctions imposed against him, however, the court of appeals made satisfaction of the sanctions he had been previously ordered to pay as a condition for reinstatement. See Smith, 10 F.3d at 724. One of respondent's premises is therefore false.

However, this statement is not only inconsistent with the allegation made by

the state disciplinary prosecutor in the reciprocal discipline complaint; it is also inconsistent with the order issued by the Tenth Circuit disciplinary panel on February 13, 1996, finding that "Mr. Smith's name was referred for attorney discipline after more than one panel of this court determined he was filing frivolous appeals and failing to pay court ordered sanctions." [Emphasis supplied.] See In re Smith, 76 F.3d 335 (10th Cir.), cert. denied, ____ U.S. ____, 117 S.Ct. 186, ____ L.Ed.2d ____ (1996). Further, this statement is inconsistent with the findings of fact and recommendation of the hearing board, issued by the hearing board of the grievance committee of the Colorado Supreme Court on April 15, 1996, finding that "[i]n Count I of the Complaint it is alleged that on November 29, 1993, Respondent was suspended from the practice of law before the United States Court of Appeals for the Tenth Circuit for filing frivolous appeals in several matters and for failing to pay any part of the sanctions imposed upon him in the total amount exceeding $50,000.00 by the United States Court of Appeals and by the United States District Court for the District of Colorado." [Emphasis supplied.] Finally, this statement is inconsistent with the recommendation of the hearing panel of the grievance committee of the Colorado Supreme Court

on August 10, 1996, adopting the findings of fact and recommendation of the hearing board.

Under these circumstances, it is clear that the Colorado Supreme Court incorrectly assumed that the Tenth Circuit disciplinary panel did not discipline Mr. Smith for his failure to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00. It is also clear that by declining to consider the merits of Mr. Smith's defenses to this allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint, the Colorado Supreme Court convicted and punished Mr. Smith for what amounts to criminal contempt without affording him his right to a full criminal process, including his Sixth Amendment right to a jury trial.[1] See International Union v.

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[1]In its (March 3, 1997) opinion, the Colorado Supreme Court held that Mr. Smith was not entitled to a jury trial on the allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint that he had filed "frivolous" appeals of U.S. District Court sanction orders to the Tenth Circuit. However, this holding is based on the false assumption that Mr. Smith takes the position that he is entitled to a jury trial on this allegation. In

Bagwell, 512 U.S. 821, 114 S.Ct. 2552, 2557, 129 L.Ed.2d 642 (1994), quoting Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441, 31 S.Ct. 492, 498, 55 L.Ed. 797 (1911); In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (attorney disciplinary proceedings are quasi-criminal in nature); Cooke v. United States, 267 U.S. 517, 534, 45 S.Ct. 390, 394, 69 L.Ed. 767 (1925); Hicks v. Feiock, 485 U.S. 624, 632, 108 S.Ct. 1423, 1429, 99 L.Ed.2d 721 (1988); and Bloom v. Illinois, 391 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968). Finally, it is clear that the Colorado Supreme Court afforded Mr. Smith fewer constitutional rights merely because he was convicted and punished in attorney disciplinary proceedings rather than in criminal contempt proceedings, in violation of his Fourteenth Amendment

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point of fact, Mr. Smith does not take the position that he is entitled to a jury trial on this allegation. Mr. Smith does, however, take the position that he is entitled to a jury trial on the allegation made by the state disciplinary prosecutor in the reciprocal discipline complaint that he had failed to comply with court orders to pay harsh and unjustified sanctions of more than $50,000.00.

right to the equal protection of the laws.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that Mr. Smith was not entitled to a due process evidentiary hearing before being disciplined in the federal proceedings and reciprocally disciplined in the state proceedings for filing alleged "frivolous" appeals of U.S. District Court sanction orders to the Tenth Circuit. However, this holding is contrary to the plain language and meaning of Fed. R. App. P. 46 and C.R.C.P. 241.14, both of which require an attorney charged with a disciplinary violation to be afforded an evidentiary hearing, the only substantial difference between the two rules being that under the federal rule, the attorney must make a request for an evidentiary hearing,[2] whereas no such request is required by the state rule. See also In re Ruffalo, supra; Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974);

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[2]Mr. Smith made at least two written requests for an evidentiary hearing in the proceedings before the Tenth Circuit disciplinary panel, but both requests were summarily denied--a blatant and egregious violation of Fed. R. App. P. 46.

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976); Cleveland Board of Education v. Loudermill, 470 U.S. 494, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985); Razatos v. Colorado Supreme Court, 746 F.2d 1429 (10th Cir. 1984), cert. denied, 471 U.S. 1016 (1985); Mattox v. Disciplinary Panel of the United States District Court for the District of Colorado, 758 F.2d 1362 (10th Cir. 1985). Contrary to language in the Colorado Supreme Court's (March 3, 1997) opinion, the federal and state rules do not require an attorney charged with a disciplinary violation to make an offer of proof before being entitled to his or her due process right to an evidentiary hearing. Further, Mr. Smith was not permitted to make an offer of proof in the disciplinary proceedings before the Tenth Circuit disciplinary panel; and denies that the offer of proof he made in the reciprocal discipline proceedings before the hearing board of the grievance committee of the Colorado Supreme Court was insufficient to show the relevance and necessity of the testimony of his witnesses, including his expert witnesses. In point of fact, Mr. Smith could not prove his defenses to the charges being brought against him in the federal and state disciplinary proceedings, and would therefore be convicted in these proceedings, in the absence of an opportunity to present the

testimony of his witnesses, including his expert witnesses, at the hearings in these proceedings. Under these circumstances, the Colorado Supreme Court's holding that Mr. Smith was not entitled to a due process evidentiary hearing before being disciplined in the federal proceedings and reciprocally disciplined in the state proceedings condoned a result which was both predictable and incredibly unfair.[3]

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[3]This unfairness is underscored by the findings of fact and recommendations of the hearing board issued by another hearing board of the grievance committee of the Colorado Supreme Court on March 6, 1997, declining to reciprocally discipline Mr. Smith based on an order issued by the Supreme Court of the United States on November 27, 1995. In its (November 27, 1995) order, the U.S. Supreme Court disbarred Mr. Smith from the practice of law in that Court for his failure to comply with an order to pay sanctions of $500.00 for filing an alleged "frivolous" petition for a writ of certiorari. In its (March 6, 1997) findings and recommendations, the hearing board found and concluded that the U.S. Supreme Court had deprived Mr. Smith of his right to due process of law by disciplining him without affording him the evidentiary hearing required by Sup. Ct. R. 8. The hearing board's (March 6,

In its (March 3, 1997) opinion, the Colorado Supreme Court held that the Tenth Circuit disciplinary panel had not deprived Mr. Smith of his Fifth Amendment due process right to fair notice of the charges being brought against him because he was given fair notice that he was being charged with filing alleged "frivolous" appeals in DeHerrera v. City and County of Denver and Casillan v.

1997) findings and recommendations are clearly inconsistent with the Colorado Supreme Court's (March 3, 1997) opinion holding that the Tenth Circuit disciplinary panel did not deprive Mr. Smith of his right to due process of law by disciplining him without affording him the evidentiary hearing required by Fed. R. App. P. 46. In this connection, it is significant to note that the hearing board permitted Mr. Smith to present the testimony of at least some of his witnesses, including his expert witnesses, before issuing its (March 6, 1997) findings and recommendations declining to reciprocally discipline him. Under these circumstances, the hearing board's (March 6, 1997) findings and recommendations underscore the unfairness to Mr. Smith of disciplining him and reciprocally disciplining him in the present case without affording him his due process right an evidentiary hearing.

Regional Transportation District; and had not deprived Mr. Smith of his Fifth Amendment due process right to an adequate opportunity to be heard with respect to these charges before entry of a final judgment because he was given an adequate opportunity to file written responses to the Tenth Circuit disciplinary panel's orders to show cause why he should not be "fined, disbarred or otherwise disciplined" for filing alleged "frivolous" appeals in these cases before entry of a final judgment. However, Mr. Smith was also being charged with filing alleged "frivolous" appeals in Dunkin v. Louisiana-Pacific Corporation and Sandlin v. Corporate Interiors, Inc. See In re Smith, supra. Despite this fact, Mr. Smith was not given an adequate opportunity (or any opportunity) to file written responses to the Tenth Circuit disciplinary panel's orders to show cause why he should not be "fined, disbarred or otherwise disciplined" for filing alleged "frivolous" appeals in these cases before entry of a final judgment. Under these circumstances, the Colorado Supreme Court committed a grievous error by holding that the Tenth Circuit disciplinary panel had not deprived Mr. Smith of his Fifth Amendment due process right to fair notice of the charges being brought against him, and had not deprived him of his Fifth Amendment due process right to an adequate opportunity to be heard with

respect to these charges before entry of a final judgment.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that the proof upon which the Tenth Circuit disciplinary panel based its determination of misconduct by Mr. Smith (if any) is not so infirm that the Colorado Supreme Court cannot, consistent with its duty, accept as final the determination of the Tenth Circuit disciplinary panel. However, the only "proof" upon which the Tenth Circuit disciplinary panel based its determination of misconduct by Mr. Smith (if any) was that previous hearing panels of the Tenth Circuit had issued unpublished orders holding that he had filed alleged "frivolous" appeals of U.S. District Court sanction orders to the Tenth Circuit. At oral argument, the Tenth Circuit disciplinary panel ruled that Mr. Smith would not be permitted to argue that these appeals were not "frivolous" because this issue had already been determined against him by previous Tenth Circuit hearing panels, and that it had no authority to overturn decisions rendered by previous hearing panels.[4] However, these rulings were

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[4]These rulings were confirmed by the Tenth Circuit disciplinary panel in its (November 29, 1993) suspension order

contrary to 10th Cir. R. 36.3, which provided that "[u]npublished opinions and orders and judgments of this court have no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel." [Emphasis supplied.] These rulings also prevented Mr. Smith from arguing that because there was a split in the federal circuits on the issue involved in his appeals, or because his appeals were good faith arguments for the extension, modification or reversal of existing law, or for the establishment of new law, the Tenth Circuit's unpublished orders sanctioning him for filing these alleged "frivolous" appeals were void ab initio. See McKnight v. General Motors Corporation, ____ U.S. ____, 114 S.Ct. 1826, 128 L.Ed.2d 655 (1994) (appeal not "frivolous" where the only basis for the order imposing sanctions on petitioner's attorney was that his argument was foreclosed by circuit precedent).[5]

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against Mr. Smith. See In re Smith, supra.

[5]The U.S. Supreme Court's decision in McKnight resolved the split in the federal circuits on the issue involved in Mr. Smith's appeals to the Tenth Circuit, and it is therefore no longer equitable

Finally, these rulings created an irrebuttable presumption of guilt that deprived Mr. Smith of his Fifth Amendment right to due process of law. Under these circumstances, Mr. Smith did not have a full and fair opportunity (or any opportunity) to litigate the issue of whether his appeals of U.S. District Court sanction orders to the Tenth Circuit were "frivolous," and the Colorado Supreme Court committed a grievous error by holding that the proof upon which the Tenth Circuit disciplinary panel based its determination of misconduct by Mr. Smith (if any) is not so infirm that the Colorado Supreme Court cannot, consistent with its duty, accept as final the determination of the Tenth Circuit disciplinary panel.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that Mr. Smith had not been deprived of his due process right to a fair and impartial

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that the Tenth Circuit disciplinary panel's (November 29, 1993) order disciplining him for filing these appeals should have prospective application. Despite this clarification of the law by the U.S. Supreme Court, the Tenth Circuit disciplinary panel continues to refuse to vacate its (November 29, 1993) suspension order against Mr. Smith.

decisionmaker in the federal and state disciplinary proceedings. However, it was reasonably questionable whether the Tenth Circuit disciplinary panel could be a fair and impartial decisionmaker in disciplinary proceedings in which Mr. Smith was attempting to challenge the validity of unpublished court orders holding that he had filed alleged "frivolous" appeals of U.S. District Court sanction orders to the Tenth Circuit, and requiring him to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the U.S. District Court. See 28 U.S.C. § 455(a); Liteky v. United States, 510 U.S. 540, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); Arnett v. Kennedy, 416 U.S. 134, 197, 94 S.Ct. 1633, 40 L.Ed.2d 15 (1974) (White, J., concurring in part and dissenting in part) ("the right to an impartial decision-maker is required by due process" in every case); Morrissey v. Brewer, 408 U.S. 471, 485-86, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (decisionmaker bias is grounds for reversal); Mayberry v. Pennsylvania, 400 U.S. 455, 469, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971) (Harlan, J., concurring) ("the appearance of evenhanded justice . . . is at the core of due process"); Goldberg v. Kelly, 397 U.S. 254, 271, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (decisionmaker bias is grounds for reversal); Offut v. United

States, 348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954) (nor may a judge or other ostensibly impartial decisionmaker "give vent to personal spleen or respond to a personal grievance" in reaching a decision). It was also reasonably questionable whether the presiding officer of the hearing board of the grievance committee of the Colorado Supreme Court could be a fair and impartial decisionmaker in reciprocal discipline proceedings in which he refused to accord Mr. Smith full right to be heard according to law, and then failed or refused to disqualify himself from the proceedings, in violation of Canon 3 of the Colorado Code of Judicial Conduct. The presiding officer also improperly combined trial and appellate functions by participating as presiding officer of the hearing board which heard the reciprocal discipline proceedings against Mr. Smith before participating as a member of the hearing panel of the grievance committee of the Colorado Supreme Court which reviewed and adopted the findings of fact and recommendation of the hearing board. Finally, it was reasonably questionable whether the hearing panel could be a fair and impartial decisionmaker in reciprocal discipline proceedings against Mr. Smith in which only six of nine members of the hearing panel participated in the action adopting the findings of fact and

recommendation of the hearing board. This dilution of participation by the membership of the hearing panel clearly deprived Mr. Smith of his due process right to a fair and impartial decisionmaker in the state disciplinary proceedings. Under these circumstances, the Colorado Supreme Court committed a grievous error by holding that Mr. Smith had not been deprived of his due process right to a fair and impartial decisionmaker in the federal and state disciplinary proceedings.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that the state disciplinary prosecutor and the presiding officer of the hearing board of the grievance committee of the Colorado Supreme Court had not deprived Mr. Smith of his Fifth Amendment privilege not to be a witness against himself by threatening to impose sanctions against him if he refused to submit to a deposition by the state disciplinary prosecutor. However, Mr. Smith took the position that he would waive his Fifth Amendment privilege not to be a witness against himself if he submitted to a deposition by the state disciplinary prosecutor, and sought to have this issue presented to the Colorado Supreme Court for resolution. Instead of following this procedure, the state disciplinary prosecutor and the presiding officer set

Mr. Smith's deposition over his objection and threatened to impose sanctions against him if he refused to attend and give testimony. Under these circumstances, the state disciplinary prosecutor engaged in prosecutorial misconduct; the presiding officer abused his discretion (if any) to threaten to impose sanctions against Mr. Smith; and Mr. Smith was deprived of his Fifth Amendment privilege not to be a witness against himself. See Spevack v. Klein, 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967). It is very ironic that the presiding officer would threaten to impose sanctions against Mr. Smith if he refused to submit to a deposition by the state disciplinary prosecutor, while refusing to permit Mr. Smith to present the testimony of his witnesses, including his expert witnesses, in his own defense at the hearing set for that purpose.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that "[b]ecause the respondent's reciprocal disciplinary proceeding was not a criminal proceeding for purposes of the Sixth Amendment right to a speedy trial, that right was not violated in this case." However, in People v. Smith, 773 P.2d 522 (Colo. 1989), the Colorado Supreme Court said:

> Given the continuing course of unprofessional acts, each of which required additional investigation by the Grievance Committee investigator and one of which occurred shortly before the grievance hearing, we are satisfied that there was no such delay in this case as to rise to the level of a due process violation or, for that matter, to result in any prejudice to the respondent.

Id. at 526-27, citing People v. Morley, 725 P.2d 510 (Colo. 1986). In the present case, a 270-day delay occurred between the date the Tenth Circuit disciplinary panel disciplined Mr. Smith (November 29, 1993) and the date the state disciplinary prosecutor filed his reciprocal discipline complaint against Mr. Smith (August 26, 1994). An additional 377-day delay occurred between the date Mr. Smith filed his answer to the reciprocal discipline complaint pleading not guilty to the charges being brought against him by the state disciplinary prosecutor (September 15, 1994) and the date he was brought to trial on those charges (September 27, 1995). During these unconscionable delays, Mr. Smith was unable to practice law and make a living because of the cloud hanging over his head, a cloud created by the reciprocal discipline proceedings pending against him.

However, no part of these unconscionable delays was attributable to additional investigation of Mr. Smith's conduct by the state disciplinary prosecutor or his investigator. If a proper investigation of Mr. Smith's conduct had been conducted, it would have been apparent that he had not engaged in any misconduct for which discipline may be imposed. Under these circumstances, the unconscionable delays in the reciprocal discipline proceedings against Mr. Smith rose to the level of a Fourteenth Amendment due process violation for which those proceedings should have been dismissed with prejudice.

In its (March 3, 1997) opinion, the Colorado Supreme Court held that the imposition by the Colorado Supreme Court of the same discipline as was imposed by the Tenth Circuit disciplinary panel would not result in grave injustice to Mr. Smith because the punishment imposed by the Colorado Supreme Court would not be harsher than that imposed by the Tenth Circuit disciplinary panel.[6] However,

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[6]In response to Mr. Smith's argument that the punishment imposed by the Colorado Supreme Court would be in violation of C.R.C.P. 241.7, which specifically prohibits an indefinite suspension from the practice of law in the State of Colorado, the Colorado

even if the punishment would not be harsher, it will still be impossible for Mr. Smith to comply with the conditions for reinstatement recommended by the hearing board and hearing panel of the grievance committee of the Colorado Supreme Court that he be required to "demonstrate that all sanctions imposed by the Tenth Circuit and the U.S. District Court have been satisfied and that all federal suspensions have been lifted." The reason for this is that the Tenth Circuit has held, in another unpublished opinion, that the harsh and unjustified sanctions of more than $26,000.00 previously imposed against Mr. Smith by United States District Judge

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Supreme Court held that an indefinite suspension was permissible provided the punishment was not harsher than that imposed by the Tenth Circuit disciplinary panel. However, a nine-month suspension from the practice of law in the State of Colorado to be followed by a suspension from the practice of law in the State of Colorado unless and until Mr. Smith can "demonstrate that all sanctions imposed by the Tenth Circuit and the U.S. District Court have been satisfied and that all federal suspensions have been lifted" (an impossible task) is much harsher than the punishment imposed by the Tenth Circuit disciplinary panel.

Edward W. Nottingham in Dunkin v. Louisiana-Pacific Corporation must still be paid by him, even though these sanctions have already been paid as a part of the consideration for the settlement of Dunkin by the parties and their attorneys. However, Mr. Smith is still financially unable to pay these or the remainder of the harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and the U.S. District Court; and he will be unable to demonstrate that all federal suspensions have been lifted unless and until he is able to demonstrate that these sanctions have been "satisfied."[7] Further, it is

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[7]The following documents (copies of which are attached to the Application to Associate Justice John Paul Stevens for a Stay of Enforcement of the Per Curiam Opinion Issued by the Supreme Court of the State of Colorado on March 3, 1997 Pending Resolution of Petition for Writ of Certiorari (No. A-792) as Exhibits 5, 6 and 7, respectively) demonstrate that in 1994 and 1995, Mr. Smith "satisfied" all sanctions imposed by the Tenth Circuit and the U.S. District Court except for the sanctions in Casillan v. Regional Transportation District: (1) Notice of Settlements; (2) Accounting; (3) Cancelled Check. Mr. Smith was (and is) financially unable to pay the

clearly inappropriate under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States for the Colorado Supreme Court to condition Mr. Smith's right to practice law in the State of Colorado on his payment of these harsh and unjustified sanctions, the validity of which are still being litigated by him in the federal courts. Under these circumstances, imposition by the Colorado Supreme Court of the same discipline as was imposed by the Tenth Circuit disciplinary panel has resulted in grave injustice to Mr. Smith.

Upon information and belief, no other attorney has ever been prosecuted, tried, convicted or punished, much less

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sanctions in Casillan, as demonstrated by the following documents (copies of which are attached to the referenced application as Exhibits 8 and 9, respectively): (1) Affidavit of David L. Smith; (2) Affidavit of M. Julia Hook. Further, the validity of the sanctions in Casillan is being challenged in a Fed. R. Civ. P. 60(b) proceeding in federal court. The Tenth Circuit disciplinary panel has nevertheless arbitrarily and discriminatorily refused to lift its indefinite suspension of Mr. Smith from the practice of law in the Tenth Circuit.

indefinitely suspended from the practice of law, by the Tenth Circuit disciplinary panel or the Colorado Supreme Court for the type of misconduct (if any) involved in this case. The discipline imposed against Mr. Smith by the Tenth Circuit disciplinary panel and the Colorado Supreme Court is so excessive and so disproportionate in comparison to the seriousness of any misconduct committed by him as to amount to Eighth Amendment "cruel and unusual" punishment. See Solem v. Helm, 463 U.S. 277, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983); see also Browning-Ferris Industries v. Kelco, 429 U.S. 257, 109 S.Ct. 2909, 2923-34, 106 L.Ed.2d 219 (1989) (O'Connor, J., and Stevens, J., concurring in part and dissenting in part). Mr. Smith appears to be the victim of the current "professionalism crusade," in which "heretical lawyers" who commit themselves to roles other than "officer of the court" are hunted down, brought before the Inquisition and burned at the stake, even though "officer of the court" is not the only legitimate, or even the most traditional, role to which lawyers may commit themselves. See Atkinson, A Dissenter's Commentary on the Professionalism Crusade, 74 TEX. L. REV. 259 (1995). As Mr. Smith sees it, his primary role is not to be "officer of the court." His primary role is to be a zealous advocate of his clients' civil

rights interests within the bounds of the law. Because the Tenth Circuit disciplinary panel and the Colorado Supreme Court have convicted and punished Mr. Smith for fulfilling this ethical obligation to his clients, the misconduct proved against him (if any) warrants that a substantially different form of discipline (including no discipline) be imposed.

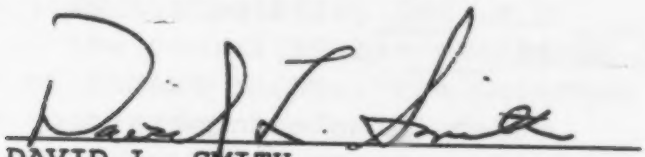
By failing or refusing to consider the issues raised and argued by Mr. Smith in his petition for rehearing of the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order, in his motion to vacate this order, and in his petition for rehearing of the denial of his motion to vacate this order, the Tenth Circuit and its disciplinary panel have deprived him of his Fifth Amendment due process right to an effective opportunity for review of this harsh and unjustified suspension order. See Walker v. City of Birmingham, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967); United States v. Ryan, 402 U.S. 530, 91 S.Ct. 1580, 29 L.Ed.2d 85 (1971); Honda Motor Co., Ltd. V. Oberg, 512 U.S. 415, 114 S.Ct. 2331, 129 L.Ed.2d 336 (1994). Further, by failing or refusing to consider the issues raised and argued by Mr. Smith in his petition for rehearing of the Colorado Supreme Court's (March 3, 1997) opinion, in his petition for a writ

of habeas corpus with respect to this opinion, and in his petition for rehearing of the denial of his petition for a writ of habeas corpus, the Colorado Supreme Court has deprived him of his Fourteenth Amendment due process right to an effective opportunity for review of this opinion, which merely rubber-stamps the Tenth Circuit disciplinary panel's harsh and unjustified suspension order. Finally, by failing or refusing to grant a hearing or to consider the issues raised and argued by Mr. Smith in his petition for a writ of habeas corpus, and in his petition for rehearing of the denial of his petition for a writ of habeas corpus, the Colorado Supreme Court has abdicated its power and responsibility to issue writs of habeas corpus pursuant to Article VI, Section 3 of the Constitution of the State of Colorado, and has suspended the privilege of the writ of habeas corpus, in violation of Article II, Section 21 of the Constitution of the State of Colorado, and Article I, Section 9 of the Constitution of the United States. See also C.R.S. § 13-45-101 et seq.; Hill v. United States, 368 U.S. 424, 82 S.Ct. 468, 7 L.Ed.2d 417 (1962); Kaufman v. United States, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed.2d 227 (1969); Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976); United States v. Addonizio, 442 U.S. 178, 99 S.Ct. 2235,

60 L.Ed.2d 805 (1979); Lonchar v. Thomas, ____ U.S. ____, 116 S.Ct. 1293, ____ L.Ed.2d ____ (1996).

Under these circumstances, it is clear that the Tenth Circuit and its disciplinary panel have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. It is also clear that the Colorado Supreme Court, the Tenth Circuit, and its disciplinary panel have decided important questions of federal law that have not been, but should be, settled by this Court. Finally, it is clear that the Colorado Supreme Court, the Tenth Circuit, and its disciplinary panel have decided important federal questions in a way that conflicts with relevant decisions in this Court. For these reasons, Mr. Smith requests this Court to grant his petition for writ of certiorari, and such other and further relief as may be just under the circumstances, including an order reversing and declaring void ab initio the Tenth Circuit disciplinary panel's (November 29, 1993) suspension order and the Colorado Supreme Court's (March 3, 1997) opinion rubber-stamping this harsh and unjustified suspension order.

Respectfully submitted,



DAVID L. SMITH

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PRO SE ATTORNEY-PETITIONER

APPENDIX

In re Smith, 10 F.3d 723 (10th Cir.), cert. denied, 513 U.S. 807, 115 S.Ct. 53, 130 L.Ed.2d 13 (1994) A-2

In re Smith, Order (10th Cir. January 3, 1994) A-5

In re Smith, Order (10th Cir. July 18, 1995) A-6

People v. Smith, ____ P.2d ____ (Colo. Sup. Ct. March 3, 1997) A-7

People v. Smith, Order (Colo. Sup. Ct. April 7, 1997) A-31

Smith v. Supreme Court of the State of Colorado, Order (Colo. Sup. Ct. April 30, 1997) A-33

Smith v. Supreme Court of the State of Colorado, Order (Colo. Sup. Ct. May 5, 1997) A-35

People v. Smith, Findings of Fact and Recommendations of the Hearing Board (March 6, 1997) A-37

People v. Smith, Order (Colo. Sup. Ct. May 16, 1997) A-52

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE:	)	
	)	No. 93-631
DAVID L. SMITH	)	

Order
Filed November 29, 1993

Before SEYMOUR, BALDOCK and BRORBY, Circuit Judges.

Respondent was ordered to show cause why he should not be fined, disbarred or otherwise disciplined for filing frivolous appeals in numbers 93-1070 and 93-1139, DeHerrera v. Denver, after the entry of this court's orders in Sandlin v. Canady (In re Canady), No. 92-1169 (10th Cir. April 27, 1993) and Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), cert. denied, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994) and for filing a frivolous appeal in Casillan v. Regional Transportation District, Nos. 92-1009 & 92-1039 (10th Cir. January 15, 1993).

Respondent maintains the appeals were not frivolous. We disagree.

The appeals were found to be frivolous by the panels who decided them. We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court. United States v. Killion, No. 92-3130, 1993 WL 408150 (10th Cir. October 13, 1993); United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir. 1990) (a three-judge panel cannot overrule circuit precedent); United States v. Berryhill, 880 F.2d 275, 277 (10th Cir. 1989), cert. denied, 493 U.S. 1049 (1990).

Respondent filed a petition for certiorari in Dunkin. The question presented for review was,

> "Whether an order sanctioning counsel currently of record is immediately appealable under the collateral order exception rule established by this Court in Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Whether sanctions may be imposed against counsel for filing

appeals warranted by existing law or by a good faith argument for the extension, modification or reversal of existing law."

Petition for certiorari, attached to appellant's motion to recall and stay the mandate filed July 12, 1993, in Dunkin v. Louisiana-Pacific Corp., Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993). Certiorari was denied without comment. Dunkin and Smith v. Louisiana-Pacific Corp., ____ U.S. ____, 114 S.Ct. 87 (October 4, 1993)(No. 92-1994).

At oral argument, respondent admitted that he has not paid any of the sanctions that have been imposed on him by this court or the district court. David L. Smith is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied.

The clerk shall provide a copy of this order to all courts before which Mr. Smith has been admitted to practice.

Entered for the court
PER CURIAM

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE:)
) No. 93-631
DAVID L. SMITH)

Order
Filed January 3, 1994

Before SEYMOUR, Chief Judge, MCKAY, LOGAN, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL AND KELLY, Circuit Judges.

Respondent's motion for stay of suspension and petition for rehearing are denied by the panel of judges before whom this proceeding was submitted.

Pursuant to Fed. R. App. P. 35(b) the suggestion for rehearing in banc was circulated to the judges of the court in regular active service. No judge having called for a poll, the suggestion for rehearing en banc is also denied.

Entered for the Court

ROBERT L. HOCKER,
Clerk
Patrick Fisher
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

IN RE:)
)
DAVID L. SMITH)

No. 93-631

ORDER
Filed: July 18, 1995

Before SEYMOUR, Chief Judge, BALDOCK, and BRORBY, Circuit Judges.

Respondent's November 29, 1994, motion to reinstate is denied.

Entered for the Court

PATRICK FISHER, Clerk

SUPREME COURT OF COLORADO
No. 96SA306 March 3, 1997

THE PEOPLE OF THE STATE OF COLORADO,
Complainant,

v.

DAVID LEE SMITH,
Attorney-Respondent.

Original Proceeding in Discipline

EN BANC ATTORNEY SUSPENDED

Linda Donnelly, Disciplinary Counsel
James C. Coyle, Assistant Disciplinary Counsel
Denver, Colorado

Attorneys for Complainant

David Lee Smith, Pro Se
Denver, Colorado

PER CURIAM

This is a reciprocal discipline proceeding arising from the respondent's discipline by the United States Court of Appeals for the Tenth Circuit (court of appeals). The court of appeals suspended the respondent from practicing before it for an indefinite period, with reinstatement contingent on the respondent's paying sanctions imposed against him by the court of appeals and the United States District Court for the District of Colorado (district court). A hearing panel of the supreme court grievance committee approved the findings and recommendation of a hearing board that the respondent be suspended from the practice of law for nine months; that prior to reinstatement he demonstrate that all sanctions imposed by the court of appeals and the district court have been satisfied that all federal suspensions have been lifted; and in the event that the respondent meets those conditions prior to the expiration of the nine-month suspension, that this court give favorable consideration to the respondent's immediate reinstatement. The respondent has filed exceptions to the panel's action. We accept the hearing panel's and hearing board's recommendations.

I.

The respondent was admitted to practice law in Colorado in 1975. Based on the respondent's testimony and the record, which included the record of the proceedings in the court of appeals, the hearing board concluded that the following had been proven by clear and convincing evidence.

On September 15, 1993, the court of appeals issued an order to the respondent to

> show cause in writing why he should not be fined, disbarred or otherwise disciplined for his actions in numbers 93-1070 and 93-1139, Deherrera v. Denver, [7 F.3d 1044 (10th Cir. 1993)] after the entry of this court's orders in Sandlin v. Canady (In re Canady), [993 F.2d 1551 (10th Cir. 1993)] and Dunkin v. Louisiana-Pacific Corporation, Nos. 92-1230 & 92-1381 (10th Cir. February 11, 1993), [cert. denied, 114 S.Ct. 87 (1993)]. The Panel in Deherrera referred this matter to this Discipline Panel because the appeal and petition for writ of mandamus were frivolous. In Casillan v. Regional Transportation District, [986 F.2d 1426 (10th Cir. 1993)], the

court also found the appeal to be frivolous. Filing a frivolous appeal is a ground for discipline because it is a violation of 10th Cir. R. 46.5.

The crux of the Deherrera matter was that the respondent had filed a number of interlocutory appeals to the court of appeals on the issue of the validity of sanctions imposed against him by the district court in that case and earlier cases. The law in the Tenth Circuit is that an order imposing sanctions on a lawyer is not a final appealable decision, but is interlocutory so an immediate appeal is not permitted. See G.J.B. & Assocs. V. Singleton, 913 F.2d 824, 827 (10th Cir. 1990). The respondent's twenty-two page answer to the show cause order was filed on October 4, 1993. In it, he asked "to be heard in person in defense and in mitigation with respect to the charges being brought against him . . . ."

The court of appeals set the matter down for a hearing on November 12, 1993, allowing fifteen minutes for oral argument, and directed the respondent to file a supplemental response to the order to show cause addressing why he should not be disciplined for filing a frivolous appeal in Casillan, as referred to in the

original show cause order. (The respondent's October 4 response only alluded to the DeHerrera case.)

On October 22, the respondent filed a motion to vacate the November 12 hearing and asked for additional time to file the supplemental response. He also requested an "evidentiary hearing or designation of a special master for purposes of conducting an evidentiary hearing" (emphasis added), merely stating that his "case in defense and in mitigation will require presentation of extensive evidentiary materials, including expert testimony . . . ." The respondent did not elaborate further on the nature of the evidence he wished to present, nor did he make an offer of proof. He filed a thirty-one page supplemental response to the order to show cause on November 2, 1993, together with another request for an evidentiary hearing without, however, any indication of the nature of the evidence he wished to present. The court of appeals accepted the supplemental response but denied the respondent's motion to vacate the November 12 hearing and his request for an evidentiary hearing.

Oral argument was held as scheduled on November 12, and on November 29, 1993, the court of appeals panel issued its

order recognizing that it was bound by the findings of the other court of appeals panels in Deherrera and Casillan that the respondent's appeals in those cases were frivolous, and noting that "[a]t oral argument, respondent admitted that he had not paid any of the sanctions that have been imposed on him by this court or the district court." In re Smith, 10 F.3d 723, 724 (10th Cir. 1993). Accordingly, the court of appeals ordered that respondent "is suspended from the practice of law before this court until all sanctions are paid. He may apply for reinstatement to our bar when he can demonstrate that each sanction order of this court or the district court has been satisfied." Id.

II.

We usually impose the same discipline that was imposed in the other jurisdiction in a reciprocal discipline proceeding unless certain exceptions exist. People v. Meyer, 908 P.2d 123, 124 (Colo. 1995). C.R.C.P. 241.17(d) provides in relevant part:

> At the conclusion of the proceedings brought under this Rule, the hearing panel shall refer the matter to the Supreme Court with the recommendation that the same

discipline be imposed by the Supreme Court as was imposed by the foreign jurisdiction unless it is determined by the hearing panel that:

(1) The procedure followed in the foreign jurisdiction did not comport with the requirements of due process of law;

(2) The proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;

(3) The imposition by the Supreme Court of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or

(4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court.

The respondent challenges the reciprocal application of the court of appeals order on all four of the above grounds as well as others. In his brief, he raises ten issues that we will address in order.

A.

In his first issue, the respondent claims that the procedure followed in the court of appeals was deficient because he

> was entitled to a full criminal process (including his Sixth Amendment right to a jury trial) before being convicted and punished by the Tenth Circuit for failing to pay harsh and unjustified sanctions of more than $50,000.00 previously imposed against him by the Tenth Circuit and by the U.S. District Court.

In the first place, we do not read the court of appeals order as disciplining the respondent for failure to pay the sanctions imposed against him. The respondent was suspended for filing frivolous appeals, as set forth in the show cause order. After admitting at oral argument that he had not paid any of the sanctions imposed against him, however, the court of appeals made satisfaction of the sanctions he had been previously ordered to pay as a condition for reinstatement. See Smith, 10 F.3d at 724. One of the respondent's premises is therefore false.

Second, the complainant points out that the respondent did not raise this precise argument in either the court of appeals or before the hearing board and that it is therefore waived. We nevertheless elect to address it in the context of whether the respondent's due process rights were violated because of the absence of a jury in the court of appeals discipline proceedings, for the purpose of C.R.C.P. 241.17(d)(1).

By its own terms, the Sixth Amendment right to trial by jury applies only to criminal proceedings: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI. "A lawyer discipline proceeding is not a criminal proceeding . . . ." People v. Morley, 725 P.2d 510, 514 (Colo. 1986) (citation omitted); see also People v. Varallo, 913 P.2d 1, 3 (Colo.) (same), cert. denied, 117 S. Ct. 80 (1996). The respondent has referred us to no authority in Colorado or elsewhere that the Sixth Amendment right to trial by jury applies to lawyer discipline proceedings, and we are aware of none. In fact, other jurisdictions have held that federal and state constitutional provisions regarding the

right to trial by jury do not apply to lawyer discipline proceedings. See, e.g., In re Cornelius, 520 P.2d 76, 83 (Alaska 1974); Attorney Grievance Comm'n v. Kerpelman, 420 A.2d 940, 947 (Md. 1980); Mississippi State Bar v. Young, 509 So. 2d 210, 212-13 (Miss. 1987). Our own Rules of Procedure Regarding Lawyer Discipline and Disability Proceedings, C.R.C.P. 241.1 to 241.6, do not authorize trial by jury. The fact that the respondent was not afforded a jury trial in the court of appeals did not violate either the Sixth Amendment or due process.

B.

The respondent's next issue is that the procedure employed by the Tenth Circuit in the disciplinary proceedings did not comport with the requirements of due process. In particular, the respondent claims that he did not receive fair notice of the charges against him and he was not given an adequate opportunity to be heard in his defense.

First, the respondent asserts that the court of appeals' show cause order did not adequately apprise him of the charges. Integral to his argument is the respondent's position that he was disciplined for failing to pay the

sanctions imposed against him and not for filing frivolous appeals. Again, however, we reject the respondent's characterization of the court of appeals action. The order suspending him indefinitely was for filing frivolous appeals in the two cases mentioned in the show cause order and not for failing to pay the sanctions imposed against him. See Smith, 10 F.3d at 724.

Second, the respondent complains that he was given only ten days in which to file his supplemental response to the part of the show cause order pertaining to Casillan. Implicit in this argument is that the original September 15, 1993 order to show cause did not encompass the Casillan appeal as well as the Deherrera appeal. See People v. Emeson, 638 P.2d 293, 294 (Colo. 1981) (noting that In re Ruffalo, 390 U.S. 544 (1968) "clearly states that the consideration of charges not made in the formal complaint constitutes a violation of the respondent's rights to procedural due process of law.") A fair reading of the September 15 show cause order, however, set out in section (I) above, discloses that the respondent was to answer to the charges that the appeals in both Deherrera and Casillan were frivolous. We therefore conclude that the show cause order did not violate the respondent's

due process rights and there was not error in permitting the respondent less than twenty days to supplement his response to address the Casillan appeal.

The respondent also alleges that he was entitled to an evidentiary hearing before the court of appeals disciplinary panel at which he could "present expert testimony and other relevant evidence . . . ." The court of appeals allowed the respondent fifteen minutes of oral argument to respond to its show cause order. The respondent cites Fed. R. App. P. 46 to support his claim that he was entitled to an evidentiary hearing before the disciplinary panel:

> (b) Suspension or Disbarment. When it is shown to the court that any member of its bar . . . has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, . . . the court shall enter an appropriate order.

> (c) Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court.

Fed. R. App. P. 46(b), (c). This rule does not grant the respondent the right to the kind of evidentiary hearing that he requested. The respondent was given the right to argue in person why he should not be disciplined. In the first place, his responses to the order to show cause did not identify any reasons for the testimony of any witnesses, much less expert witnesses. Insofar as the respondent's expert evidence and testimony was intended to be relevant to whether the respondent's appeals in Deherrera and Casillan were frivolous or not, that issue had already been determined by the court of appeals panels deciding those respective appeals, and the disciplinary panel was without the power to reverse or overrule the findings of the other panels in those cases. See Smith, 10 F.3d at 724. The same analysis

resolves the appropriateness of the sanctions the respondent was ordered to pay by the court of appeals and the district court. Expert testimony was either irrelevant to the issues before the disciplinary panel or unnecessary because the disciplinary panel was certainly capable of determining and applying the law to the respondent's case without it.

Finally, the respondent advances no relevant or valid reasons why he was denied his right to be heard before a fair and impartial decisionmaker. The questions before the court of appeals disciplinary panel were limited to whether the respondent had filed frivolous appeals in Deherrera and Casillan, and if so, what the appropriate disciplinary sanction should be. The legality and validity of the monetary sanctions previously imposed had been conclusively determined in the previous cases and could not be collaterally attacked in the disciplinary proceeding. See Smith, 10 F.3d at 724.

We find, as did the hearing board, that the Tenth Circuit disciplinary proceedings did not violate due process.

C.

The respondent next contends that the proof upon which the court of appeals based its determination of misconduct was so infirm that this court cannot, consistent with its duty, accept as final the court of appeals' determination. See C.R.C.P. 241.17(d)(2).

In this exception, the respondent focuses on the insufficiency of the proof to show that he willfully failed to pay the sanctions imposed against him and to rebut the defenses presented in his response and supplemental response to the order to show cause. These defenses included that he had been sanctioned for making arguments either warranted under existing law or good faith attempts to extend, modify, or reverse existing law; and that his failure to pay the sanctions imposed against him was not grounds for discipline, especially since he is unable to pay them.

As we said above, the court of appeals disciplinary panel was foreclosed from redetermining whether the respondent's appeals in Deherrera and Casillan were frivolous. See Smith, 10 F.3d at 724. The respondent was not disciplined for failing to pay the sanctions imposed against him. His

defenses were not relevant to the issues before the panel, and we conclude that the proof relied on by the Tenth Circuit was not so infirm to justify this court's disregarding the disciplinary panel's action.

D.

Moving to the reciprocal discipline proceedings below, the respondent charges that these proceedings did not comport with due process of law, and that the assistant disciplinary counsel engaged in prosecutorial misconduct.

First, the respondent argues that the assistant disciplinary counsel had no right to take the respondent's deposition in the reciprocal discipline proceeding because requiring the respondent to be deposed violated his Fifth Amendment right against self-incrimination.

In Spevack v. Klein, 385 U.S. 511 (1967), the Supreme Court held that the Fifth Amendment privilege against self-incrimination afforded protection to the accused lawyer in a disciplinary proceeding. The lawyer in Spevack was deprived of his rights under the Fifth Amendment when he was disbarred solely because he refused to testify in a judicial investigation into his alleged

improper solicitation of clients. 385 U.S. at 514. We noted in People v. Robnett, 859 P.2d 872, 875 (Colo. 1993), that Spevack did not specifically hold, however, that attorney disciplinary proceedings were criminal in nature for purposes of the Fifth Amendment privilege against self-incrimination. Accordingly, most courts and commentators after Spevack have tended to read the decision narrowly, concluding that disciplinary proceedings are not themselves criminal in nature for purposes of the privilege, and have "limit[ed] the scope of the privilege in disciplinary proceedings to only those disclosures that could be used in a criminal prosecution, or that could lead to other evidence that might be so used." II ABA/BNA Lawyers' Manual on Professional Conduct at 101:2402 (1984); see generally Andrea G. Nadel, Annotation, Extent and Determination of Attorney's Right or Privilege Against Self-Incrimination in Disbarment or Other Disciplinary Proceedings - Post-Spevack Cases, 30 A.L.R.4th 243 (1984 & Supp. 1992).

Consistent with this view of Spevack, the California Supreme Court stated:

> An attorney in a State Bar disciplinary matter does not possess

> the same immunity from being called to testify as a criminal defendant; the attorney "may be called upon to testify but may decline to answer questions on the ground that his testimony would tend to incriminate him." (Black v. State Bar (1972) 7 Cal. 3d 676, 688, 103 Cal. Rptr. 288, 499 P.2d 968.)

In re Utz, 769 P.2d 417, 422 (Cal. 1989). Analogously, the hearing board could properly require the respondent to attend his own deposition, at which time he could decline to answer specific questions if invocation of the privilege against self-incrimination was appropriate. The presiding officer of the hearing board was acting within his proper sphere when he ruled on the assistant disciplinary counsel's motions. See C.R.C.P. 241.14(b). Moreover, from the record before us, the respondent did not raise his privilege against self-incrimination in the Tenth Circuit disciplinary proceedings, nor is it obvious why the charges against him for filing frivolous appeals raised the fear of criminal prosecution. Requiring the respondent to attend his own deposition was not an error.

The respondent's second contention is that the assistant disciplinary counsel was guilty of prosecutorial misconduct by asking for sanctions in the event the respondent refused to be deposed. This objection is baseless and will not be addressed further.

The respondent's final claim is that the board denied him due process when it did not permit the many witnesses, including expert witnesses, to testify at the respondent's hearing. The respondent was not able to justify the calling of these witnesses by means of an offer of proof that they would testify to matters relevant to the reciprocal proceeding. We find that the hearing board quite properly refused to allow the respondent to call these witnesses.

E.

Because the respondent's reciprocal disciplinary proceeding was not a criminal proceeding for purposes of the Sixth Amendment right to a speedy trial, that right was not violated in this case. See In re Briggs, 502 N.E.2d 879, 886 (Ind. 1987).

F.

In his next issue, the respondent argues that the proof before the hearing board was so infirm that this court cannot accept it. While this is a basis for not accepting the determinations of another jurisdiction as to lawyer misconduct and the appropriate sanction, C.R.C.P. 241.17(d)(2), it does not apply to the findings and recommendations of a hearing board and the supreme court grievance committee hearing panel to this court. Through this exception the respondent attempts to raise the same objections he has already raised, and we have rejected, with regard to the Tenth Circuit disciplinary panel proceedings. This contention is without merit.

G.

The respondent's following two exceptions do not require extended discussion. First, the hearing panel accepted the board's recommendation that the respondent be suspended from the practice of law for nine months; that prior to reinstatement he demonstrate that all sanctions imposed by the court of appeals and the district court have been satisfied and that all federal suspensions have been lifted; and in the

event that the respondent meets those conditions prior to the expiration of the nine-month suspension, that this court give favorable consideration to the respondent's immediate reinstatement. Contrary to the respondent's claim, this recommendation does not violate C.R.C.P. 241.17(d) because it does not recommend a harsher discipline against the respondent than the Tenth Circuit's indefinite suspenion. The definite period of suspension, in this case nine months, is mandated by requirement that all suspension be of definite length in Colorado, not to exceed three years. See C.R.C.P. 241.7(2). The board's provision that the court give favorable consideration to the respondent's immediate reinstatement if he meets the conditions imposed by the Tenth Circuit, prevents the recommendation from even theoretically violating C.R.C.P. 241.17(d).

Second, the respondent asserts that his due process rights were violated because one of the members of the hearing panel that reviewed the board's action was the presiding officer of the board. We rejected the identical contention in People v. Fitzgibbons, 909 P.2d 1098, 1100-01 (Colo. 1996).

H.

According to the respondent, imposition by the supreme court of the same discipline against him as was imposed by the Tenth Circuit would result in a grave injustice. See C.R.C.P. 241.17(d)(3). The respondent advances no reasons for this proposition, except that under Colorado law a suspension from the practice of law may not be for an indefinite period. This is probably inconsistent with his argument that the sanction recommended by the hearing board is invalid because it is harsher than that imposed by the Tenth Circuit. In any event, the hearing board's recommendation that the respondent's nine-month suspension be lifted in the event he satisfies the federal sanctions and the Tenth Circuit suspension has been lifted does not violate C.R.C.P. 241.7 at all.

In conclusion, the respondent alleges that "[t]he misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court." C.R.C.P. 241.17(d)(4). It is true that we cannot impose an indefinite suspension on the respondent under our rules. The hearing board attempted therefore to fashion a sanction authorized by our rules and which has an

effect similar if not identical to the sanctions imposed by the court of appeals.

We note that in People v. Hartman, 744 P.2d 482 (Colo. 1987), we suspended a lawyer for six months in a reciprocal discipline matter for filing frivolous pleadings in three cases in the United States Tax Court. We conclude that the hearing board's recommendation is a reasonable solution to the problem of the minor incompatibility between federal and state disciplinary procedures. We decline the respondent's invitation to retry the reasonableness of the monetary sanctions imposed by the district court and the court of appeals in cases other than the one before us. Accordingly, we accept the hearing panel's and hearing board's recommendations.

III.

It is hereby ordered that David Lee Smith be suspended from the practice of law for nine months, effective thirty days after the opinion is issued. It is also ordered that the respondent pay the costs of these proceedings in the amount of $1,863.43 within ninety days from the date on this opinion. It is further ordered that prior to reinstatement the respondent demonstrate that all sanctions

imposed by the court of appeals and the district court have been satisfied and that all federal suspensions have been lifted; and in the event that the respondent meets these conditions prior to the expiration of the nine-month suspension, the respondent may petition this court for immediate reinstatement.

SUPREME COURT, STATE OF COLORADO
CASE NO. 96SA306
ORIGINAL PROCEEDING IN DISCIPLINE

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

vs.

DAVID LEE SMITH,

Respondent.

Upon consideration of the Petition for Rehearing filed in the above captioned matter, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 7, 1997.

cc: James C. Coyle
Asst. Disciplinary Counsel
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Denver, Colorado

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Denver, CO 80202

James P. Hollaway
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600 17th St., Suite 920S.
Denver, Colorado 80202-5435

David Lee Smith
5800 E. 6th Avenue Parkway
Denver, CO 80220

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SA151
ORIGINAL PROCEEDING, WRIT OF HABEAS CORPUS

ORDER OF COURT

DAVID LEE SMITH,

Petitioner,

v.

SUPREME COURT OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition to Associate Justice Mary J. Mullarkey for a Writ of Habeas Corpus; Motion for a Stay of the Per Curiam Opinion Issued by the Supreme Court of Colorado on March 3, 1997 Pending Resolution of Petition for a Writ of Certiorari; and Request for an Evidentiary Hearing on Petition for a Writ of Habeas Corpus filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 30, 1997.

cc: David L. Smith
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SUPREME COURT, STATE OF COLORADO
CASE NO. 97SA151
ORIGINAL PROCEEDING, WRIT OF HABEAS CORPUS

ORDER OF COURT

DAVID LEE SMITH,

Petitioner,

v.

SUPREME COURT OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, MAY 5, 1997.

cc: David L. Smith
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SUPREME COURT, STATE OF COLORADO
Case No. GC 95B-124
ORIGINAL PROCEEDING IN DISCIPLINE BEFORE THE GRIEVANCE COMMITTEE

FINDINGS OF FACT AND RECOMMENDATIONS OF THE HEARING BOARD

THE PEOPLE OF THE STATE OF COLORADO,

Complainant,

vs.

DAVID LEE SMITH,

Respondent.

This matter was heard on November 25 and 26, 1996 in Denver, Colorado, before a hearing board ("board") composed of Mark D. Korman and Bethiah Beale Crane, enlisted members of the Bar, and John F. Gallagher, Presiding Officer. The People were represented by James C. Coyle, Assistant Disciplinary Counsel, and the respondent appeared pro se.

The Complaint charged the respondent with violations of Rule 241.6 of the Colorado Supreme Court Rules Concerning

Discipline of Attorneys, the Colorado Rules of Professional Conduct, R.P.C. Rule 8.4(a) (violation of a rule of professional conduct), Rule 8.4(d) (engaging in conduct that is prejudicial to the administration of justice); and Rule 8.4(h) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law).

The board heard testimony from the respondents' witnesses (Robert Atkinson, Jr., Julia Hook, James E. Qualls and Bennett J. Wasserman) and considered statements and arguments by Mr. Coyle and Mr. Smith.

The complainant's exhibit 1 was received into evidence. The complainant's exhibit 5, the alleged Certificate of Service, was offered into evidence, but not admitted. The respondent's exhibits A, B, Q and r were received into evidence. The respondent's exhibits C through P, and S and T, were offered into evidence, but not admitted.

On November 22, 1996, the respondent filed the following:

(1) A Motion to Dismiss Complaint With Prejudice For Lack of Independent Prosecutor with the Supreme Court of the United States. A ruling on that motion was deferred, and said motion is hereby denied.

(2) A document styled "Respondent's Suggestion that the Supreme Court of Colorado Lacks Jurisdiction of the Subject Matter of the Complaint," which requested relief of an order dismissing the complaint. Ruling on that request was deferred and is hereby denied.

At the outset of hearing, the following motions were made:

1. The complainant orally moved to sequester witnesses. The motion was granted as to fact witnesses, excluding Julia Hook and the expert witnesses.

2. The respondent orally moved for dismissal of the complaint on grounds of the complainant's failure to provide a speedy trial and that the disciplinary counsel's office was aware of respondent's disbarment by the United States Supreme Court on November 7, 1995, yet it did not serve the complaint on respondent until December 29, 1995. Ruling on that motion was deferred and is hereby denied.

At the close of testimony, the parties were requested to file by December 5, 1996 additional information or position statements addressing the meaning and impact of disbarment by the United States Supreme Court, and that Court's requirement for reinstatement to practice before it. The complainant submitted additional information, including an affidavit from Deborah L. Ortiz, Disciplinary Counsel Investigator, stating that an attorney disbarred by the United States Supreme Court may petition for readmission to that court after completing three years of good standing in the jurisdiction where the lawyer is licensed, and the petition is subject to review by the full court.

On December 4, 1996, respondent filed his "Motion for an Expedited Determination of His Guilt or Innocence on the Charges of the Complaint, and Statement of Position on the Issue of the Duration of a Disbarment by the Supreme Court of the United States." Respondent stated that he had been unable to find any authority on the issue of the duration of a disbarment by the United States Supreme Court, and requested an expedited decision by this board.

On December 4, 1996, respondent filed his "Verified Supplement to Record

Concerning Certificate of Service Obtained by Assistant Disciplinary Counsel James C. Coyle from Rolf G. Asphaug." Respondent therein recited his recollections of fact concerning a question addressed to him at hearing as to the filing with this board of certain documents.

On January 8, 1997, complainant filed a Supplement to its Response to Respondent's Verified Statement to Record Concerning Certificate of Service which presented a set of certified copies received from the United States Supreme Court on January 7, 1997 of a motion for just damages and double costs and certificate of service regarding such motions received by the United States Supreme Court on February 15, 1995.

On January 13, 1997, respondent filed a "Motion to Strike Response and Supplement to Response filed by Assistant Disciplinary Counsel James C. Coyle," which requests the striking of the document presented by complainant as a certified copy of the certificate of service. Given the conclusion below, ruling on this motion is moot.

FINDINGS OF FACT

Based on the evidence presented, the board finds that the following facts are established by clear and convincing evidence:

1. The respondent was licensed to practice law in the State of Colorado on October 6, 1975, registration number 6934. The respondent is subject to the disciplinary and disability jurisdiction of the Colorado Supreme Court and its Grievance Committee in these disciplinary proceedings. C.R.C.P. 241.1(b), et seq.

2. The respondent was disbarred from the Supreme Court of the United States on November 27, 1995 for failing to comply with a March 6, 1995 order of that Court (copy attached and marked as complainant's exhibit A).

3. The March 6, 1995 order with which the respondent failed to comply granted a motion by the Regional Transportation District for award of damages and double costs related to the respondent's filing of a Petition for Writ of Certiorari with the United States Supreme Court in the case of James Edward Qualls and David L. Smith v. Regional Transportation District, et al. No. 94-1283, which the Regional Transportation

District claimed was frivolous. The respondent was ordered to pay $500.00 to counsel for the Regional Transportation District on or before March 27, 1995.

4. The respondent did not pay the $500.00. The respondent argued at hearing that he deliberately chose not to because he wanted the opportunity to contest the order upon which it was based.

5. An Order to Show Cause was entered by the Court on October 2, 1995 ordering the respondent to pay the $500.00 as previously ordered with 21 days, and to show cause in writing why he should not be disbarred from the practice of law in the Court or otherwise disciplined for failure to comply with the previous order. The respondent was suspended from practice before the Court pending outcome of the matter.

6. The respondent filed a Verified Response to Rule to Show Cause on October 25, 1995, but did not pay the $500.00 which he had previously been ordered to pay.

7. U.S. Supreme Court Rule 8 provides as follows:

> Rule 8. Disbarment and Disciplinary Action
>
> 1. Whenever it is shown to the Court that a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, that member will be suspended from practice before this Court forthwith and will be afforded the opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or upon the expiration of the 40 days if no response is made, the Court will enter an appropriate order.
>
> 2. The Court may, after reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule of the Court.

8. The United States Supreme Court did not charge the respondent with conduct unbecoming a member of the Bar of the Court, did not allow 40 days in which he would be afforded the opportunity to show cause, and did not conduct a hearing of any sort.

9. A lawyer disbarred from the practice of law before the United States Supreme Court may petition for readmission after completing three years of good standing in the jurisdiction in which the lawyer is licensed.

10. Failure to pay a court ordered fine is not, in and of itself, grounds for disbarment in any jurisdiction.

DISCUSSION

11. This matter was prosecuted as a reciprocal proceeding based upon Rule 241.17. Independent violations of other disciplinary rules were also alleged, although no evidence was presented by Complainant in support of these violations other than the fact of the respondent's disbarment by the United States Supreme Court.

12. Rule 241.17(d) requires this board to refer the matter to our Supreme Court "with the recommendation that the same discipline be imposed by the Supreme Court as was imposed by the foreign jurisdiction" unless the board determines one of the following four exceptions has been met:

(1) The procedure followed in the foreign jurisdiction did not comport with requirements of due process of law;

(2) The proof upon which the foreign jurisdiction based its determination of misconduct is so infirm that the Supreme Court cannot, consistent with its duty, accept as final the determination of the foreign jurisdiction;

(3) The imposition by the Supreme Court of the same discipline as was imposed in the foreign jurisdiction would result in grave injustice; or

(4) The misconduct proved warrants that a substantially different form of discipline be imposed by the Supreme Court.

13. The complainant's case relied entirely upon the fact of the respondent's disbarment from the United States Supreme Court. Exploration of the basis and procedure related to the disbarment was made by extensive factual and expert testimony presented in defense of the respondent's actions.

14. The respondent essentially asserted two defenses. First, he argued his refusal to pay the $500.00 fine imposed by the Court was based upon his good faith belief that his original Petition for Writ of Certiorari was not frivolous, and that it had not received adequate consideration as an argument for extension or change of existing law. He believed disobeying the Court's order was the only avenue available to obtain further review of his case, and that the risk he faced, by not paying the fine, was a possible further sanction or threat of contempt. Second, the respondent contended he was not afforded due process in his disbarment, and that the conduct which led to his disbarment did not amount to an ethical violation which would warrant professional discipline in Colorado.

15. The respondent's tenacious quest for review of his client's case by the United States Supreme Court might be considered by some as ill-conceived, overzealous, or even bizarre quirkiness. Many attorneys, including the board members, would probably have conceded defeat, or at least paid the Court's sanctions while pursuing further review. The board members believe that the respondent's decision to not pay the Court's sanctions at least by deposit to the Court, if not to Mr. Asphaug, was unwise. The board is nevertheless persuaded that the respondent's refusal to pay the sanction reflected his belief, albeit also his poor judgment, that this was a necessary choice in order for his case to have a chance for additional review by the Court. The board also believes the discipline reasonably risked by pressing further review in such manner was an additional monetary sanction or a possible threat of contempt, and not disbarment.

16. Moreover, the board is extremely concerned with the process which led to the respondent's disbarment. Expert testimony was presented in the area of professional responsibility generally, and practice before the United States Supreme Court. That evidence demonstrated that the failure to pay a

court ordered sanction was not the basis for disciplinary action in any jurisdiction, or the United States Supreme Court. The complainant presented no evidence that such a failure was the basis for disciplinary action in Colorado.

17. It also appears to the board that the United States Supreme Court failed to follow the requirements of its own Rule 8, set forth above, by failing to advise the respondent that he was charged with "conduct unbecoming a member" of the Court, failing to afford the respondent a full 40 days within which to show cause, and failing to conduct a hearing on the material disputed fact of the reason behind the respondent's refusal to pay the $500.00 sanction. Taken as a whole, the evidence strongly implies that the majority of the Court's Justices did not review and may not have been aware of the respondent's disbarment. It appears to the board that the disciplinary action was taken by the Court's clerk and treated as a ministerial act.

18. Also troubling is the information presented in the affidavit of Deborah L. Ortiz, outlining that a lawyer disbarred from the practice of law before the United States Supreme Court may

petition for readmission after completing three years of good standing in the jurisdiction in which the lawyer is licensed. If the respondent's license to practice law in Colorado is revoked because of his disbarment by the United States Supreme Court, then his ability to petition for readmission to the United States Supreme Court after three years good standing in Colorado is foreclosed. The United States Supreme Court's readmission policy seems to contemplate the absence of reciprocal discipline in a lawyer's licensing jurisdiction.

CONCLUSIONS

19. The board concludes that the respondent's inability to be heard in a meaningful time and manner as required by the United States Supreme Court's Rule 8 amounts to a denial of due process, and that the proof upon which the disbarment was founded was so infirm that the Colorado Supreme Court cannot, consistent with its duty, accept as final the United States Supreme Court's determination. Additionally, the board believes that the imposition by the Colorado Supreme Court of the same discipline imposed by the United States Supreme Court would result in grave injustice to the respondent. Hence, the board concludes that the

exceptions in Rule 241.17(d) have been satisfied so as to preclude a recommendation that the Colorado Supreme Court impose the same discipline as that imposed by the United States Supreme Court.

20. The board also concludes that the respondent's actions did not constitute a violation of any of the Colorado Rules of Professional Conduct set forth in the complaint (R.P.C. Rules 8.4(a), 8.4(d) or 8.4(h)).

RECOMMENDATION

The hearing board recommends to the hearing panel that the complaint filed in this disciplinary proceeding be dismissed.

DATED this 6th day of March, 1997.

Mark D. Korman

Bethiah Beale Crane

John F. Gallagher
Presiding Officer

SUPREME COURT, STATE OF COLORADO
CASE NO. 97SA169
RECIPROCAL PROCEEDING IN DISCIPLINE,
GC 95B-124

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

DAVID LEE SMITH,

Respondent.

Upon consideration of the Complainant's Petition for Review Pursuant to C.R.C.P. 241.15(b)(1) filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that the Complainant's Petition for Review Pursuant to C.R.C.P. 241.15(b)(1) shall be, and the same hereby is, DENIED.

BY THE COURT, May 16, 1997.

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